No. 15778.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LYON FURNITURE MERCANTILE AGENCY,

Appellant,

vs.

IRENE M. CARRIER, doing business as WISHMAKER HOUSE,

Appellee.

Upon Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Background information, as set forth in Appellant's statement of the case, is substantially true. The facts that give rise to the case, however, are not therein set forth. The Appellee, Mrs. Carrier, did take over the operation of the Carrier Furniture Company (later changed to Wishmaker House) on or about April 10, 1953. At that time, her husband left, never to return to the business. She found the business to be in a precarious position, owing some $49,000.00 in accounts and finding little or no cash with which to pay the creditors. She immediately appealed to Mr. F. J. Hill, Manager of the Wholesale Credit Association of Arizona, for assistance, and together they

worked out a plan for the repayment of the debts, Mr. Hill at all times acting on behalf of the creditors.

During the ensuing months, Mrs. Carrier was able to pay a substantial amount to the creditors, in accordance with agreements with Mr. Hill, and all this information was at all times made available to Lyon, and was in fact a part of their record.

The Appellee's case is quite simple to state. Lyon Furniture Mercantile Agency, having undertaken to report its opinion of the financial condition of the Appellee's business, must have an affirmative duty to disseminate fairly the information which it has at its disposal and in its files. This was not done. On the contrary, for reasons unknown, the series of reports, which are in evidence, show what appear to be a deliberate injury to Mrs. Carrier in her business. The Appellee has no desire to examine, at this time, in a detailed way, the testimony of Mr. Byron M. Halfyard, the employee of Lyon who was charged with the duty of preparing the reports. But such a detailed examination would disclose such a careless disregard for the interests of Mrs. Carrier as to certainly imply malice. The first such example appears on page 146 of the transcript of the record. Mr. Halfyard was requested to explain what information he had used to report that Mrs. Carrier had no previous experience. Mr. Halfyard referred to the local credit agency in Phoenix that had sent a report to Lyon at the request of Halfyard. That report shows that Mrs. Carrier had been active in the business since 1946. Mr. Halfyard then states that his reference to the lack of experience of Mrs. Carrier referred to prior to 1946. The report issued by Lyon and prepared by Mr. Halfyard was in 1953. Apparently, seven years' experience was no previous experience to Mr.

Halfyard. He was later asked a series of questions with respect to the information contained in the Lyon file with respect to the various arrangements made by Mrs. Carrier for the payment of creditors. It will be apparent to the Court, from examination of his testimony in conjunction with the information contained in the various reports, which are exhibits, that each bit of information which might be considered favorable to Mrs. Carrier was omitted. Perhaps the most damaging item in the various reports was the statement contained in several of the reports [See Exs. 13, 14 and 15] that "Collection Record: During 1953 eight items of collection were placed with the Agency." Mr. Halfyard was asked [p. 178]: "Q. And do you ever mention in there whether or not the matters were paid or not? A. Never in a paragraph of that type." Mr. Halfyard was then shown a Lyon-Redbook report on a firm called "House of Enchantment," Tuscon, Arizona, April 1, 1955 (Arizona being Mr. Halfyard's territory), and Mr. Halfyard was asked to read [p. 179] from the paragraph in that report entitled "Collection Record." "A. Yes, sir. 'June 29, 1954 claim' so and so. Do you want the number? Q. No. A. (Continuing): $186.75 placed in Los Angeles office for goods sold from March 3rd to March 17th, 1953, collected by Agency July 24, 1954."

The facts, then, are relatively simple. The Appellant had substantial information with which to prepare the report. The Court found, as it must, that Appellant was grossly negligent in reporting these facts, and that the Appellee was thereby damaged.

II.

Section 830 of the Code of Civil Procedure of the State of California Is Not Applicable to Actions in the United States District Court.

Under well-settled decisions (*Erie Railroad Co. v. Tompkins*, 304 U. S. 64), procedural matters are not restrictions on the United States District Court. This section is clearly procedural, since it could not possibly effect the substantive rights of either of the parties. And the precise question has been examined by this Court in the case of *Jefferson v. Stockholders Publishing Co.*, 194 F. 2d 281, in which the Court stated:

> "This being an action for libel and no undertaking for the payment of costs having been filed with the Complaint, the Clerk appears to have assumed that compliance with Rule 4(a) (Fed. Rules of Civil Procedure), was precluded by Section 1 of Act 4317 of Deering's General Laws of California (Code of Civil Procedure, Section 830). The assumption was incorrect. Section 1 relates to State Court actions, not to Federal Court actions. In Federal Courts, compliance with Rule 4(a) is required in all civil actions, including actions for libel."

Appellant cites the case of *Kennley v. Superior Court*, 43 Cal. 2d 512, in support of *Keller Research Corp. v. Roquerre*, 99 Fed. Supp. 964. An examination of the *Kennley* case shows that the California Supreme Court held that the Judge in the *Keller* case erroneously applied Section 830 to cross-complaints. Needless to say, the California Supreme Court did not examine the question of the applicability of a procedural Code section to Federal procedure.

III.

The Findings Are Sufficient to Support the Judgment.

Appellant, in its paragraphs IV, V, VI, VII, VIII, IX and XI, attempts to have this Court reverse the case, not on the merits, but merely for its failure to make specific findings as to each of the detailed alleged defenses raised at the Trial Court.

The cases in this Court, as well as throughout the other Circuits, are myriad in their holdings that the Trial Court is not required to make findings on all of the facts presented, if the findings are sufficient to support the ultimate conclusions of the Court. (See *Oedekerk v. Muncie Gear Works, Inc.*, 179 F. 2d 821; *Norwich Union Indemnity Co. v. Haas,* 179 F. 2d 827; *Yanish v. Barber,* 232 F. 2d 939.) In addition, the failure of the Trial Court to make a specific finding on a particular issue does not constitute reversible error where the record clearly reveals the basis on which relief was granted, and additional findings are not necessary. (*Hines v. Perez,* 242 F. 2d 459.)

IV.

A Mercantile Agency, Even Where Acting Under the Cloak of a Qualified Privilege, May Not Invoke That Privilege in a Grossly Negligent Manner.

In an examination of authorities throughout the United States, counsel for the Appellee has been able to find but one case precisely in point to the one at bar. That is the case of *Douglass v. Daisley,* 114 Fed. 628. In that case, as in this, the defendant, a mercantile reporting agency, falsely reported that the plaintiff had made an assignment for the benefit of creditors. He had, in fact, simply made an assignment to secure a loan. The Court discusses at length the question of the qualified privilege and the right

inherent in such privilege to report information that is, in fact, false. It is not argued therein, nor is the contention here made, that the information contained in a report which may be qualifiedly privileged, must necessarily be true. The very purpose of the qualified privilege is to allow firms engaged in that business to report to the various subscribers the information which they received, irrespective of its truth or falsity. And in the case of *Douglass v. Daisley, supra,* the Court states at page 633:

> "The occasion being privileged, we do not think the general rule of law that liability results from accidental or inadvertent slander, and that the accident or inadvertence only operates to remove malice and limit the damages, applies to this case, and it is for the reason that the occasion was privileged, and the defendant was in the exercise of a right. It being a business right, however, or a private right, to gather and impart information to such members of the business world as were its subscribers, it must exercise the right reasonably, to the end that unnecessary harm shall not come to business men about whom the information is furnished. It is not a right which can be exercised heedlessly or carelessly. It is difficult to find a principle of law which would justify the careless or wanton exercise of a right of this character, and afford immunity on the ground of privilege. . . . Reasonable care and prudence with respect to forwarding information may, therefore, continue the privilege and clothe the acts of the agency with immunity, and, on the contrary, negligence may destroy the privilege and leave the parties responsible for acts which are culpable. Though the action is privileged, the privilege does not carry immunity to heedless and careless management in forwarding information."

The substantive law of California is unquestionably the same, although the precise question has not previously been determined.

In 30 Cal. Jur. 2d 799, it is stated:

> "A conditional privilege is lost, not only when the publication is motivated by hatred or ill will toward the plaintiff, but also when excessive language is used, defamatory matter is published for an improper purpose, or the defamation goes beyond the legitimate interest involved. Such privilege may give a person immunity for a publication which is actually false, but which, when he made it, he honestly believed to be true; but he is not given a license to overdraw, exaggerate, or color the facts.
>
> The conditional privilege accorded to communications between interested persons is generally limited to communications made in good faith and honest belief in their truth. Knowledge of its falsity at the time of making it destroys the privileged character of such a communication, as does lack of probable cause for belief in its truth or of reasonable grounds for such belief. Whether a publication for which a conditional privilege is claimed was made maliciously and without reasonable or probable cause for believing it to be true is a question for the jury."

See, also:

> *Snively v. Record Publishing Co.,* 185 Cal. 565, 198 Pac. 1.

The attention of the Court is respectfully directed to the case of *Brewer v. Second Baptist Church,* 32 Cal. 2d 791, 197 P. 2d 713. The Court stated:

> "A privilege would exist in this case if the publication had been made without malice and the occasion

had not been abused. . . . For this conditional privilege extends to false statements of fact, although the occasion may be abused and the protection of the privilege lost, by the publisher's lack of belief, *or of reasonable grounds for belief, in the truth of the defamatory matter,* by excessive publication, by a publication of defamatory matter for an improper purpose, or if the defamation goes beyond the group interest. . . . Although there are situations where the protection of the interest involved may make it reasonable to report rumors or statements that the publisher may even know are false, *ordinarily the privilege is lost if the defendant has no reasonable grounds for believing his statements to be true."* (Emphasis added.)

V.

The Damages Awarded by the Court Are Clearly Supported by the Evidence.

It is without question that the publication of one that he is unwilling or refuses to pay his debts, is libelous *per se.* (See *Neaton v. Lewis Apparel Stores,* 48 N. Y. S. 2d 492, 495.) The law presumes that damages follow from a publication that is defamatory *per se,* and under the circumstances damages will be awarded in a substantial amount. (*Smith v. Lyon,* 142 La. 975; *Jarmen v. Rea,* 137 Cal. 339.) In the case of *Wilson v. Fitch,* 41 Cal. 363, the California Supreme Court stated:

> "The law implies that every libelous publication causes some damage to the injured party . . . and that it is the province of the Jury to estimate the amount."

The libelous statements issued by the Appellant are contained in four separate reports issued by them of the

financial condition of the Appellee during the years 1953, 1954 and 1955. From the evidence of the two manufacturer's representatives called by Appellee, Mr. Benet Frankel and Mr. Norman Davis, the rating contained in the book of "13-6" would in and of itself keep them from calling on an account; this, without even seeing the report, and in view of Mr. Halfyard's testimony that the proper rating would have been "13", rather than "13-6". These same gentlemen also testified that were they to find a "13" rating, they would make their own inquiries, and from that determine their course of conduct.

The Appellee testified that in one of the years just prior to the publication of the libel herein complained of, that the business then operated by her and her husband made a net profit in excess of $19,000.00. She further testified that in her opinion, that in the absence of the several libels by the Appellant, that the business reasonably should have shown a net profit during the years 1953, 1954 and 1955 of approximately $12,000.00 each. Where the defendant's wrongful act has made it difficult for the plaintiff to show, with reasonable certainty, the amount of his loss, the United States Supreme Court, in *Story Parchment Co. v. Patterson,* 282 U. S. 555, stated:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all the relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such cases, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to com-

plain that they cannot be measured with the exactness and precision that would be possible if the case which he alone is responsible for making were otherwise. (Citing cases.) As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of the injured parties."

And see also *American Life Insurance Co. v. Shell,* 90 So. 2d 719, in which the verdict for $34,360.00 in a libel action was sustained, and wherein the above quote from the *Story Parchment Co.* case was cited in support thereof.

Respectfully submitted,

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